UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DORIE M. LAVIENE, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER SF07529lC0006 DATE: [redacted]

David S. Handsher, Esquire, San Francisco, California, for the appellant.

Richard L. Munson, San Francisco, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board on a Recommended Decision in which the administrative judge recommended that the agency be found in partial compliance with a final Board decision. For the reasons set forth below, the Board FINDS the agency has now COMPLIED with the Board's final decision and DISMISSES the enforcement proceeding as moot.

BACKGROUND

In June, 1990, the appellant, a distribution clerk, was assigned permanent light duty of 8 hours per day with various medical restrictions pursuant to the recommendation of his doctor, Eugene Mar. Moreover, as a result of a medical consultation with Dr. Terri Alyami, the appellant was temporarily placed on further medical restrictions limiting his work day to 4 hours until October 1, 1990. However, upon viewing excerpts of a video showing appellant dancing at a dance party, Dr. Alyami rescinded the 4-hour restriction and indicated that the appellant was capable of working an 8-hour day with various restrictions. On July 20th, the agency gave the appellant a limited duty job offer consistent with Dr. Alyami's new restrictions. Although Dr. Alyami approved the job offer, the appellant was given a week to check with the doctor before giving his acceptance. The appellant never responded to the offer, and he was placed in an off-duty status and put on administrative leave from July 27, 1990, until he was removed on September 21, 1990.

The July 20th job offer was also approved by the Department of Labor (DOL) on August 10, 1990. However, because the appellant contested DOL's approval, DOL ordered a second opinion evaluation of appellant's back condition by Dr. Peter Slabaugh, an orthopedist. Following an examination on October 4, 1990, Dr. Slabaugh wrote a recommendation that appellant was fit to work 8 hours a day with certain limitations.

The agency removed the appellant based on its charge that he had misrepresented the extent of his back injury in order to obtain 4 hours of compensation per scheduled work day which would not otherwise have been available to him. The appellant appealed the agency's action to the Board. In a decision dated January 22, 1991, which became the final decision of the Board on February 26, 1991,[1] the administrative judge reversed the agency action, holding that the agency did not prove its charge by preponderant evidence. The decision accordingly ordered the agency to restore the appellant retroactively to his position and to issue a check to the appellant for the appropriate amount of back pay, with interest and benefits, no later than 20 and 60 calendar days, respectively, from February 26, 1991.

On February 7, 1991, well in advance of the Board's ordered deadline, the appellant was administratively restored to the rolls retroactive to September 21, 1990. On March 4, 1991, the agency orally presented a job offer to the appellant that proposed to reinstate him to his former distribution clerk position with restrictions consistent with Dr. Slabaugh's recommendations. The appellant responded that the offer should be consistent with Dr. Mar's earlier recommendations of June, 1990. The agency then sent the appellant its offer in writing on March 20th. The offer stated at page 2 that "[v]ariations from the above duties may

---

[1] No petition for review was filed in this case.

occur as directed by your supervisor and will be in accordance with your doctor's limitations." Thereafter, on March 21, 1991, Dr. Slabaugh approved the agency's offer with some minor modifications and on April 1st, the agency resubmitted to the appellant a revised offer—consistent with the doctor's modifications. On April 10, the appellant responded, stating that while he was ready, willing and able to work, he could not accept or reject the offer until DOL could determine if it was within his restrictions and his physician approved it. Because the appellant asked DOL to approve the job offers made to him, the agency placed the appellant on "Leave Without Pay" (LWOP) status, rather than on an "Absent Without Leave (AWOL)" status, pending DOL's approval. On May 28, 1991, the appellant returned to duty after the agency's representative agreed to meet with his supervisor to ensure that he would be working within the restrictions set forth by the offer.

This enforcement proceeding was initiated on April 17, 1991 by a petition filed pursuant to 5 C.F.R. § 1201.182(a). The appellant alleged that the agency was not in compliance with the Board's decision and order because it failed to provide interim relief, to retroactively restore him to the status quo ante and to reimburse him appropriate back pay and benefits. With regard to the restoration issue, the appellant contended that the agency had not put him back to the status quo ante because the agency had offered him a job whose physical activity description was beyond the medical restrictions formerly observed for the appellant in the job he

held prior to the wrongful removal. The agency responded to the appellant's petition by asserting that it is in compliance with the Board's decision and order.

In her Recommendation, the administrative judge found that the agency was not required to give interim relief, noting that interim relief is available, if appropriate, only in cases where a petition for review is filed. However, she also found that the Board's case law relating to compliance requires that the agency not unreasonably delay the reinstatement of an appellant. The administrative judge found that the agency had not unreasonably delayed in offering to reinstate the appellant in accordance with his medical restrictions.

In this regard, the administrative judge found that, although the appellant had a right to have DOL and his doctor evaluate the proposed restrictions, the agency was not obligated to pay an employee who chooses not to work pending a medical evaluation of the job offer. The administrative judge distinguished the situation here from the case where the agency is obligated to pay an employee because it requested that the employee absent himself from the work-place pending an agency requested medical evaluation. She noted that the agency's obligation might have been different had the appellant presented medical evidence that he was unable to work or that he had requested sick leave.

The administrative judge also found that the appellant did not meet his burden of showing that he was ready, willing

and able to perform his duties. She found that the appellant had not presented credible evidence that his current condition continues to warrant the more stringent restrictions imposed by Dr. Mar in June 1990 and that he had not proffered any evidence that the more stringent restrictions were required. On the contrary, the administrative judge found that the recommendations of the orthopedist, Dr. Slabaugh, were consistent with the appellant's physical condition and were based on his physical examination of the appellant. The administrative judge accordingly concluded that the appellant was not ready, willing and able to work from the time the decision became final and the date of his actual return to duty on May 28th and, as such, was not entitled to pay for this time. Similarly, she found that the agency did not violate the Board's order in placing him on leave without pay for this period.

In addition, the administrative judge found that the appellant has been restored to the status quo ante. She found that he was reinstated to his distribution clerk position and that, although the agency had returned the appellant to duty under somewhat different medical restrictions, it had properly done so under the circumstances of this case.

With regard to back pay, the administrative judge found that there was no evidence to show that the appellant was unwilling to work during the period between his removal on September 21, 1990, and February 26, 1991, the date the initial decision became final. The administrative judge found

that there was no merit to the agency's argument that the appellant's unwillingness to work during this period was evidenced by his request to have DOL and his doctor evaluate the agency's July 20th limited duty offer. She found that the agency had precluded appellant from demonstrating that he was willing to work by placing him on emergency leave on July 27th and that his delay in accepting the agency's July 20th offer was not concrete evidence that he was unwilling to work. She therefore ordered the agency to award appellant back pay and benefits for the period between September 21, 1990 and February 26, 1991.

ANALYSIS

We agree with the administrative judge that interim relief was not appropriate in this case because such relief is only available when a petition for review is filed, and none was filed here. 5 U.S.C.A. § 7701(b)(2)(A)(West. Supp. 1991). In addition, we adopt the administrative judge's reasoning that the appellant's reinstatement to the distribution clerk position, consistent with the appellant's current medical condition, restored the appellant to the status quo ante as required by law. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984) (compliance with a reinstatement order occurs when the agency places the employee as nearly as possible in the status quo ante).

The Board also adopts the Recommended Decision's findings with regard to back pay. We agree with the administrative judge that the appellant bears the burden of showing that he

was ready, willing, and able to work in order to be entitled to back pay. *See Redding v. United States Postal Service*, 32 M.S.P.R. 187, 191 (1987). Here, we note that the appellant, himself, chose not to work pursuant to the agency's April 1st offer, even—though the offer contained a provision that "[v]ariations from the above duties may occur as directed by your supervisor and will be in accordance with your doctor's limitations." *See* Compliance File, Vol. 1, Tab 1, attachment to appellant's petition to enforce initial decision. Thus, we agree with the administrative judge that the appellant was not entitled to back pay from February 26, 1991, the date the initial decision became final, and the date of his actual return to duty on May 28, 1991, because he did not show that he was ready, willing and able to work during this period.

However, we find, with the administrative judge, that there was no evidence that the appellant was unwilling to work during the period between his removal on September 21, 1990, and February 26, 1991, the date the initial decision became final. The agency did not dispute with concrete positive evidence the appellant's assertion that he was ready, willing and able to work during this period. The agency therefore failed in its burden to prove its affirmative defense of no liability for back pay and we adopt the Recommended Decision's finding ordering back pay for this period. *See Redding*, 32 M.S.P.R. at 192.

The agency did not disagree with the administrative judge's determination regarding the back pay issue, because on

November 5, 1991, the agency gave the appellant a check for back pay for the period at issue and the appellant signed a receipt for this check. *See* Compliance File, Vol. II, Tab 1, attachment D. Also, on November 7, 1991, the agency sent to the Clerk of the Board evidence of compliance in response to the Recommended Decision consisting of the following items: (1) "Employee Statement To Recover Back Pay"; (2) "Back Pay Decision/Settlement Worksheet"; (3) back pay computations for the period from September 22, 1990, through February 26, 1991; and (4) a copy of the receipt signed by the appellant for a back pay check in the amount of $9,231.54. In light of our agreement with the Recommended Decision and this evidence of compliance, we find that the appellant's petition for enforcement is now moot. Accordingly, we hereby DISMISS this enforcement proceeding. This is the final order of the Merit Systems Protection Board in this enforcement proceeding.

NOTICE TO APPELLANT

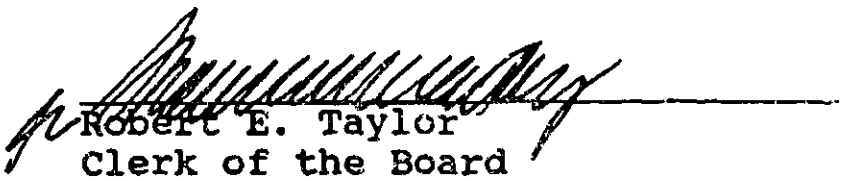
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your enforcement proceeding if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.